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SUPREME COURT OF THE UNITED STATES

NUMBER 1635

WILLIAM GREEN JACKSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

[redacted]

IN THE

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Petitioner, WILLIAM GREEN JACKSON, requests that a Writ of Certiorari issue to review *United States v. Jackson*, No. 24353 (9th Cir. December 18, 1970), 436 F.2d 39 (Appendix I), rendered by the

United States Court of Appeals for the Ninth Circuit, San Francisco, California, on December 18, 1970, affirming the conviction of the petitioner, petition for rehearing denied on March 29, 1971.

OPINIONS BELOW

A copy of the opinion from the Ninth Circuit Court of Appeals, No. 24353, December 18, 1970, 436 F.2d 39, affirming the petitioner's conviction is attached as Appendix I (petition for rehearing denied March 29, 1971.)

JURISDICTION

On December 18, 1970, the United States Court of Appeals for the Ninth Circuit in No. 24353 (Appendix I), affirmed the judgment, conviction and sentence of the petitioner in the United States District Court for the Central District of California (petition for

rehearing denied March 29, 1971).

Petitioner submits that Title 28 U.S.C. §1254 (1), confers jurisdiction on this Court.

Jurisdiction is further urged pursuant to Rule 19(1)(b), Supreme Court Rules, because the United States Court of Appeals for the Ninth Circuit has:

a. Decided a Federal question in a way in conflict with the applicable decisions of the Third Circuit Court of Appeals and the Fifth Circuit Court of Appeals.

b. Decided a Federal question in a way in conflict with the applicable decisions of this Court.

c. Decided a Federal question in a way which denied the petitioner due process and the right to a jury trial.

QUESTION PRESENTED

Did the District Court err in

ruling as a matter of law, over petitioner's objection, that the property allegedly stolen was property of the United States or of an agency thereof, thereby taking from the jury its determination as to whether or not one of the elements of the crime charged was proved beyond a reasonable doubt, contrary to the Fifth and Sixth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, Constitution of the United States, 1791.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, Constitution of the United States, 1791.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 18 U.S.C. §641

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent

to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted —

Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100.00, he shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725."

STATEMENT OF THE CASE

On February 11, 1969, the petitioner Jackson was brought to a jury trial in the United States District Court for the Central District of California pursuant

to Title 18, U.S.C. §3231, being charged with violating 18 U.S.C. §641. On February 13, 1969, the petitioner was found guilty as charged.

Specifically, the petitioner was found guilty of having stolen a Mark 12 airplane radio and its power unit by removing same from a government owned Piper Cub airplane, which airplane was on loan to the Fort Irwin Flying Club. One of the essential elements of the crime charged is that the property allegedly stolen must have been property of the United States or of an agency thereof.

The specific issue involved in this Petition is whether or not the trial court judge, based upon evidence not admitted by the petitioner before said court, had a right to determine as a matter of law that the Mark 12 airplane radio and its power unit was property of the United States or of an agency thereof,

thereby denying the petitioner a jury trial on an essential element of the crime charged.

The only testimony concerning the ownership of said radio and power unit came from respondent's witness, one Captain E. Edward Brown. The pertinent parts of Capt. Brown's testimony concerning this subject is as follows:

1. The airplane was owned by the United States Government (R 63 and 64).

2. The radio and power unit was ordered by the United States Army, Fort Irwin Flying Club, through the Post Central Fund (R 65).

3. The Fort Irwin Flying Club is an organization established by Army Regulations and is an instrumentality of the United States (R 65).

4. The radio and power unit was placed into the subject airplane (R 66).

5. The subject airplane was

transferred temporarily to certain persons being individuals he knew to be various presidents of said flying club (R 68).

6. The government purchased the radio (R 68).

7. The airplane was loaned to the flying club by the government (R 73).

8. The flying club, a government instrumentality, ordered and paid for the radio (R 74).

9. The flying club is an instrumentality of the government because it is established by regulation (R 74).

10. It is presumed that the radio and power unit was the property of the United States Government for claims purposes (R 78).

11. The Fort Irwin Flying Club is an agency of the government (R 78).

12. The flying club's property is the government's property and the

government's property is the flying club's property for claims purposes (R 79).

13. The government had no records other than those of the flying club's since the flying club was an agency of the government (R 80 and 81).

14. The radio and power unit was ordered by the central post fund for the flying club (R 83).

15. Army Regulation 28-95 concerns army flying clubs being government instrumentalities but it is only his conclusion that the Fort Irwin Flying Club is such a flying club (R 212 and 213).

16. In his opinion, the government would have a right to file a claim for the stolen radio (R 214).

17. In his opinion, the United States Government is the true owner of the radio and power unit (R 214).

18. Army Regulation 230-60 supposedly states that all club property

reverts to the United States Government (R 222). Said Regulation was not entered into evidence.

19. There were countless other Regulations that might be in point (R 225). Said Regulations were not entered into evidence.

20. He based his opinion upon his knowledge of non-appropriated fund activities and their workings with the government (R 226).

Over petitioner's objections, the trial court judge then ruled that as a matter of law, said radio and power unit was government property and the jury would be so instructed (R 250 through 253), and the jury was in fact so instructed (R 276).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. Conflict With Other Circuits

The Third Circuit Court of Appeals has held that inasmuch as an accused is presumed innocent, he is entitled to have all of the elements submitted to the jury, notwithstanding that certain evidence is uncontradicted. As the Court stated in *United States v. Manuszak*, 234 F.2d 421 (3rd Cir. 1956):

> "The presumption of innocence to which appellant was entitled demanded that all factual elements of the government's case be submitted to the jury. It is immaterial that the government's evidence as to the actual theft was uncontradicted. The acceptance of such evidence and the credibility of witnesses is for the jury, even though to the court

the only possible reasonable result is the acceptance and belief of the government's evidence. A partial direction of the verdict occurs when the court determines an essential fact, and then denies the appellant trial by jury. See *Bollenbach v. United States*, 1946, 326 U.S. 607, 66 S.Ct 402, 90 L.Ed. 350; *United States v. Gollin*, 3rd Cir; 1948, 166 F.2d 123, 125-126; *United States v. Raub*, 7th Cir, 1949, 177 F.2d 312, 315-316; *Carothers v. United States*, 5th Cir., 1947, 161 F.2d 718, 722."

The Fifth Circuit Court of Appeals in *Carothers v. United States*, 161 F.2d 718 (5th Cir. 1947) likewise held that when the judge decides a fact issue material to the defendant's conviction instead of submitting it to the jury for

its determination, such deprives the defendant of his constitutional right to a trial by jury; and in a criminal case, even when the evidence is clear and beyond question, the court may not direct a verdict as to any fact.

The Fifth Circuit considered this matter once again in *Bryan v. United States*, 373 F.2d 403 (5th Cir. 1967) and reinforced its prior holding by citing with approval *Roe v. United States*, 287 F.2d 435 (5th Cir. 1961). One of the issues dealt with in *Roe* was whether or not sales of mineral leases on specific pieces of property were sales of "investment contracts" within the Securities Act definition of a security. The trial court judge had instructed the jury that such leases were, as a matter of law, securities within the meaning of the law. On appeal, the Fifth Circuit held that such an instruction was in error and

stated:

> ". . . no fact, not even on undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system, the Trial Court may never instruct a verdict either in whole or in part . . . .
>
> And yet, that is substantially what the Trial Judge did here on the crucial issue of whether these were investment contracts. He instructed them flatly and without equivocation that they were."

However, the Ninth Circuit in the instant case held that the trial court judge properly ruled as a matter of law that the allegedly stolen property was property of the United States or of an agency thereof. The Court, in its

opinion, states that the undisputed facts showed that the radio in question was carried on the property records of the Fort Irwin Flying Club, a nonappropriated, sundry fund activity established pursuant to Army Regulation No. 28-95; that the radio was purchased by the government for the club and paid for out of club membership dues; that the radio was installed in a government owned Piper Cub on loan to the club; that Army Regulation No. 27-37 provides that in the event of damage or loss to property of nonappropriated funds, the government shall have the right to file a claim in favor of the United States. Based upon said facts, the Court of Appeals upheld the legal determination of the trial court judge.

However, the crucial question is not whether or not such legal determination is correct; the question is whether

or not the accused has a right to have these "facts" presented to the jury for the jury's determination as to whether or not these "facts" are indeed the facts. Should the jury then determine that said "facts" are indeed the facts, then the Court's legal conclusion may follow.

The Court of Appeals based its decision in the instant case upon its prior decision in *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964), aff'd on other grounds, 381 U.S. 437. Even assuming, arguendo, that the Court of Appeals was correct in *Brown*, the *Brown* case is easily distinguished from the instant case.

In *Brown*, the defendant was convicted under a statute making it unlawful for a member of the Communist Party to serve on

an executive board of a labor organization. The Court of Appeals upheld the instruction to the jury that the board in question, as a matter of law, was an executive board within the meaning of the statute. However, in *Brown*, the constitution of the labor organization was introduced into evidence and the defendant admitted that the document was indeed the constitution. It was therefore for the court merely to interpret said constitution as it concerned the board. In interpreting the constitution, the court held as a matter of law that the board was an executive board. The Court of Appeals considered the constitution as being an "admitted" fact. The powers of the board being admitted (via said constitution), this presented only one question to the court - do these powers make it an executive board as a matter of law?

However, with respect to the instant case, if left to the jury, the jury may well have decided to give no credit to the tesitmony of Captain Brown and to give his testimony no weight whatsoever. If the jury had reached such a determination, there would have been no facts before the judge for him to conclude that the radio and power unit in question was the property of the United States Government. The army regulations introduced merely call certain flying clubs instrumentalities of the United States Government. But there is nothing in the evidence, outside of the possible testimony of Captain Brown, that would indicate that the Fort Irwin Flying Club was established pursuant to said regulation.

If the testimony of Captain Brown is to be disbelieved, then there is no evidence of the Government's interest in the radio.

In effect, the trial court should have instructed the jury, that if the jury found facts, A, B, C, D etc. to be so, then the jury should take as a matter of law that the radio was the property of the United States Government. This the court failed to do. Therefore it is inescapable that the trial court's instruction was improper inasmuch as it took away from the jury that which the jury should have decided. This was obviously not the problem facing the court in the *Brown* case.

If the question is whether or not certain acts took place, such is a jury question. If the question is whether or not *admitted* facts result in a certain legal conclusion, then that legal conclusion is in the province of the judge.

In the instant case, unlike *Brown*, there was not a single *admitted* document or fact before the court to be given

legal significance. Almost all of the so-called "uncontroverted facts" came from the testimony of Captain Brown as set forth above. It is well settled that the creditability of a witness and the weight to be given to his testimony is solely within the province of the jury. *Taylor v. United States*, 238 F.2d 409 (9th Cir. 1965); *Hammond v. United States*, 356 F.2d 931 (9th Cir. 1966).

B. Conflict With This Court

The United Stated Supreme Court has previously examined this issue in *Horning v. District of Columbia*, 254 U.S. 135. The Court there stated:

> ". . . the judge always has the right and duty to tell them [the jury] what the law is *upon this or that state of facts* that may be found, and he can do the same none the less when the facts are

agreed." (Emphasis supplied.)

Thus, it is always within the province of the jury to decide if in fact certain "facts" do exist with the possible exception of admitted or agreed to facts. There is nothing in the record in the instant case which would in any manner indicate that the appellant admitted any of the "facts" which the trial court judge relied upon in reaching his legal conclusion.

CONCLUSION

Petitioner urges that the United States Court of Appeals for the Ninth Circuit has ruled that a trial court judge may find, as a matter of law, that one of the essential elements of a crime charged has been proven thereby taking away such determination from the jury.

This ruling violates the petitioner's right to due process under the Fifth

Amendment to the Constitution of the United States and violates the petitioner's right to a jury trial under the Sixth Amendment to the Constitution of the United States and is contrary to the opinion of the Court in *Horning v. District of Columbia*, 254 U.S. 135.

The rulings of the District Court and the United States Court of Appeals for the Ninth Circuit affirming the petitioner's conviction are contrary to the opinions of this Court and to the opinions of the Third and Fifth Circuits and should be reviewed. Accordingly, petitioner urges this Court to grant his petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and urges that his conviction be reversed by this Court.

Respectfully submitted,

NORMAN E. GREEN

By /s/ Norman E. Green

806 Arizona Title Building
Phoenix, Arizona 85003

Attorney for Petitioner

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. 24,353

WILLIAM GREEN JACKSON,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of California

Before: BARNES and DUNIWAY, Circuit Judges, and CROCKER, District Judge*

DUNIWAY, Circuit Judge:

Jackson was convicted by a jury on a charge of stealing property of the

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*Honorable M. D. Crocker, United States District Judge, Eastern District of California, sitting by designation.

United States in violation of 18 U.S.C. § 641. He presents two questions that merit discussion.

1. Validity of the confession.

Jackson contends that his confession, obtained in the absence of counsel, should have been excluded at trial. At the hearing to determine voluntariness Jackson testified that immediately before making the incriminating statements he was fully warned of his rights, including the right to appointed counsel and the right to remain silent, and that he read and signed a waiver of those rights. He does not contend that the waiver was not free and intelligent. At no time did he request appointment of counsel. Under similar circumstances we have held the waiver effective and the ensuing confession voluntary. See Little v. United States, 9 Cir., 1969, 417 F.2d 912; United States v. Dowells, 9 Cir.,

1969, 415 F.2d 801; Reinke v. United States, 9 Cir., 1968, 405 F.2d 228; Coughlan v. United States, 9 Cir., 1968, 391 F.2d 371.

Jackson argues that because on prior occasions he had refused to make any statements to FBI agents until he had consulted his lawyer, he should not have been questioned further without counsel present. He relies on United States v. Barnes, 9 Cir., 1970, ___F.2d ___, (Nos. 24,956 and 24,786, September 8, 1970). In Barnes the defendants refused to sign a waiver of constitutional rights. Customs agents, who had obtained a confession implicating the defendants from an accomplice, then brought the accomplice into a room with the defendants and had her repeat her confession. Thus confronted, the defendants admitted their complicity. In holding the interrogation illegal, we stressed that the defendants

specifically indiçated they did not wish to be questioned further and refused to sign waivers and that the obvious purpose of the use of the accomplice and the continued interrogation was to break their self-imposed silence.

Jackson's case is different. When he initially refused to answer any questions he also indicated "he had some things to say but would like to talk to his lawyer before saying anything," and "preferred to wait a little while." He did not ask that a lawyer be appointed, although he was told that this could be done. The agents waited four days before again seeing him on the day the statements were made. They asked him whether he had changed his mind and was now willing to talk with them. He did not make any incriminatory statements before he signed a waiver of rights. This is a far cry from the flagrant disregard of the

defendants' rights in Barnes, where the interrogation followed on the heels of specific requests not to be questioned further, no waiver was signed, and the purpose was to surprise the defendants with the confession of an accomplice. We find nothing in Barnes or in Miranda v. Arizona, 1966, 384 U.S. 436, to preclude officers from again seeing a suspect in custody who has indicated a potential willingness to talk, after a reasonable interval, provided that their questioning is for the limited purpose of finding out whether the suspect has changed his mind. Jackson's confession was properly admitted in evidence.

2. The instruction that the property was government property.

The trial judge instructed the jury that as a matter of law the property allegedly stolen was "property of the United States or of an agency thereof."

Jackson argues that this instruction invaded the province of the jury by withdrawing from its consideration one of the essential elements of the crime charged. The trial judge in a criminal case may instruct the jury on a question of law which is based upon undisputed facts. Brown v. United States, 9 Cir., 1964, 334 F.2d 488, 491-92 and 497-501 (concurring opinion), aff'd on other grounds, 1965, 381 U.S. 437. In Brown the defendant was convicted under 29 U.S.C. § 504 making it unlawful for a member of the Communist Party to serve on an executive board of a labor organization. The court instructed the jury that the board in question was an executive board within the meaning of the statute. We upheld the instruction because the nature and powers of the board under the union's constitution were undisputed and the only remaining issue, whether the

board was an "executive board" within the meaning of the statute, presented a pure question of law. This case is controlled by Brown.

The property in question is a Mark 12 airplane radio and its power unit. The radio was carried on the property records of the Fort Irwin Flying Club, a nonappropriated, sundry fund activity established pursuant to Army Regulation No. 28-95. The radio was purchased by the government for the club and paid for out of club membership dues. It was installed in a government owned Piper Cub on loan to the club. Army Regulation No. 27-37 provides that in the event of damage or loss to property of nonappropriated funds the government shall have the right to file a claim in favor of the United States. These facts were undisputed and constitute the sum of the evidence introduced on the question of

ownership of the radio. The only remaining issue involves the legal significance of these facts and of the army regulations. Whether the radio, in the language of section 641, is a "thing of value of the United States or of any department or agency thereof" is purely a question of law within the special expertise of the trial judge. In instructing the jury on the law, the judge need not deal in abstractions but may be as specific as the facts permit. And where the facts are undisputed and no issue of credibility is involved, as is the case here, the judge may tell the jury that, as a matter of law, a legal relationship is thereby established. There is no significant abridgement of the right to jury trial; the jury's dispensing power -- the power to decide against the law and the facts -- remains intact. The instruction stated the correct legal conclusion.

Jackson argues that because the radio was purchased from membership dues rather than appropriated tax revenues the radio was the property of the members and not of the United States, or at least that it was for the jury to decide whether the radio was government property. The source of the funds used to purchase the radio is not controlling here. The Fort Irwin Flying Club is not simply an ordinary unincorporated association. It exists pursuant to and is dependant upon the authority of the United States Army. Army Regulation No. 28-95 provides for the establishment of such funds and designates them "Government instrumentalities." The purpose of the club is to enhance welfare and morale of Army personnel and civilian employees, and thus it is an integral part of military activity. Members have no proprietary interest in property held by the

club. See Martin v. United States, 10 Cir., 1959, 264 F.2d 270. Loss or damage to property of the club gives rise to a claim in favor of the United States. A.R. 27-37. All of these factors, we think, compel the conclusion that such clubs are arms of the government performing a governmental function, cf. Standard Oil Co. v. Johnson, 1942, 316 U.S. 481, 483-85. Therefore, club property is, as a matter of law, property "of the United States or of [a] department or agency thereof."

Affirmed.

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER _____

WILLIAM GREEN JACKSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

NORMAN E. GREEN, counsel for petitioner, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has mailed with air mail postage prepaid 2 copies of the following documents to the United States Attorney for the Central District

of California, Los Angeles, California, and has forwarded by air mail postage prepaid 2 copies of the following documents to the Solicitor General, Department of Justice, Washington, D. C., 20530, on this 22nd day of April, 1971:

(1) Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

(2) Affidavit of Service.

/s/ Norman E. Green
Norman E. Green

SUBSCRIBED AND SWORN to before me this 22nd day of April, 1971.

/s/ William H. Howard
Notary Public